NO. 22349

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOMENIC N. MASTRIPPOLITO,
CLINTON B. HOWARD,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
United States Attorney,
DAVID R. NISSEN,
Assistant U. S. Attorney,
Chief, Special Prosecutions
Division,
GERALD F. UELMEN,
Assistant U. S. Attorney,

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

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I

JURISDICTIONAL STATEMENT

This is an appeal from the conviction of both appellants, each on one count of wilful evasion of the occupational tax (wagering), in violation of Sections 4411 and 7201, Title 26, United States Code, and one count of aiding and abetting, in violation of Section 2, Title 18, United States Code. Jurisdiction of the District Court was based upon Section 3231, Title 18, United States Code. Jurisdiction of this Court to entertain the appeal by appellant Mastrippolito is derived from Sections 1291 and 1294, Title 28, United States Code. The appellee contends, however, that this Court has no

jurisdiction to entertain the appeal by appellant Howard, and hereby moves that said appeal be dismissed on the ground it is moot.

II

SPECIFICATION OF ERRORS

The following issue is raised by the motion of the Appellee to dismiss the appeal by appellant Howard:

(1) Does this Court have jurisdiction to entertain an appeal from a criminal conviction where the only sentence imposed, a fine, has been paid in full without securing a stay of execution?

Only one issue is raised by the argument presented in Appellant's Opening Brief, in light of the recent decision of the Supreme Court in Marchetti v. United States, ___ U.S. ___, 36 L.W.4143 (Jan. 29, 1968):

(2) Does Marchetti v. United States require reversal of the conviction of appellant Mastrippolito?

III

STATEMENT OF FACTS

The following statement of facts has been stipulated to as an agreed statement on appeal, pursuant to Rule 76, Federal Rules of Civil Procedure:

On October 12, 1966, the Federal Grand Jury sitting for the Central District of California returned a two count indictment

charging in Count One that appellant Domenic N. Mastrippolito, during the tax year ending June 30, 1967, was engaged in the business of accepting wagers and engaged in receiving wagers for others engaged in such business, was required by law to pay the Occupational Tax (Wagering) imposed by Sections 4411 and 4412, Title 26, United States Code, and that he wilfully attempted to evade and defeat said tax in violation of Title 26, United States Code, Section 7201. The same charge was made in Count Two as to appellant Howard, who was also charged with aiding and abetting Mastrippolito in Count One. Similarly, appellant Mastrippolito was charged with aiding and abetting Howard in Count Two.

On November 7, 1966, both appellants appeared and entered pleas of not guilty.

On January 4, 1967, trial began before the Honorable Jesse W. Curtis, United States District Judge. Trial by jury was waived. A Motion to Suppress, filed on behalf of appellant Howard, was denied after full hearing.

By Stipulation (Exhibit #19), it was agreed that Clinton B. Howard did not register or pay for the Special Occupational Tax Stamp, Wagering, for the tax year ending June 30, 1967, and that Domenic N. Mastrippolito did not register or purchase said Tax Stamp until October 4, 1966, three days after appellant Howard's arrest.

Testimony revealed that investigation of this case began on September 19, 1966, when agents of the Intelligence Division of the Internal Revenue Service were told by a reliable, confidential

informant that the appellant Domenic Mastrippolito was currently operating as a bookmaker in the Los Angeles area, and was accepting wagers over telephone number PO 9-4494. A representative of Pacific Telephone Company identified this as an unlisted number subscribed to by Penelope Spencer at 3871 Willowcrest Avenue, Apartment 11, North Hollywood, California.

Working undercover, Special Agent Werner Michel of the Internal Revenue Service rented Apartment 10 at 3871 Willowcrest Avenue, North Hollywood, for the purpose of identifying the occupant of Apartment 11. On September 29, 1966, while in Apartment 10, Agent Michel was approached by appellant Clinton B. Howard, who knocked on the door, identified himself, and told Michel that he resided in Apartment 11, and that he would be home during the day and hoped that the noise would not bother Mr. Michel. In parting, he asked Michel, "You're not a bookmaker, are you?". Agent Michel observed Howard return to Apartment 11, and later leave from that apartment.

The same day, agents learned that a new telephone number was being used by appellant Mastrippolito to accept wagers. This number, TR 2-0101, was identified as an unlisted number subscribed to by C. B. Howard at 4547 Colbath, Apartment 12-A, Sherman Oaks, California. In surveillance, agents observed the appellant Howard leave the apartment at 4547 Colbath at 6:40 p.m., and drive to the apartment at 3871 Willowcrest Avenue. The next morning, Howard's automobile was observed parked at 4547 Colbath Avenue.

On September 30, 1966, search warrants were issued for 4547 Colbath Avenue, Apartment 12-A, as well as 3871 Willowcrest Avenue, Apartment 11, by the United States Commissioner at Los Angeles. Both warrants were executed the following day. The search of 3871 Willowcrest, Apartment 11, revealed that the apartment was empty except for two telephones, which had been disconnected and placed in the bottom drawer of a cupboard. At approximately 1:20 p.m., after knocking, announcing their authority and purpose, then waiting 30 seconds, agents forced entry to apartment 12-A at 4547 Colbath Avenue. Upon entering, the agents observed appellant Clinton Howard seated at a desk, wiping a slate (Exhibit No. 1), with a damp rag (Exhibit No. 2). After Mr. Howard was placed under arrest, a search of the desk at which he was seated revealed a typical bookmaker's "phone spot", where bets are initially called in by the bettors and temporarily recorded until relayed to a "back office" where permanent records are kept. Expert testimony elicited at trial revealed that the reason permanent records are not kept at a "phone spot" is because that is the number known to the bettors, hence the most susceptible to "visits" by law enforcement officers. A slate and a damp rag is a device frequently used to destroy records of bets, which are written on the slate with felt pens (several felt pens were also seized, Exhibit No. 5). Also seized were numerous Sports Journals, listing games to be played, with written notations of the "line" or abetting odds (Exhibits Nos. 4, 7). "Line" information and other notations were also recorded on rice paper, a type of paper which immediately

dissolves upon contact with water (Exhibits Nos. 6, 9).

In a bedroom dresser drawer, agents found a set of handwritten instructions, detailing the steps to be taken by a phone spot clerk to destroy the evidence in the event of a raid by law enforcement officers (Exhibit No. 13).

Other items found in the apartment included listings of bettors, bearing a reference to "Dom" (Exhibit No. 8), a diary containing newspaper clippings relating to the arrest of Domenic Mastrippolito and others on charges of evading the Federal Occupational Tax Stamp (Wagering) (Exhibit No. 10), and an address book listing bettors and "code numbers" used for identification (Exhibit No. 11).

While searching the premises, the agents answered the telephone on numerous occasions. One caller asked "where's Dom?" Some callers merely left a name or a code number, others asked for odds, and still others actually placed bets with the agents. These bets were on football games at 11 for 10. Testifying as an expert, a special agent of the Internal Revenue Service explained that a bookmaker's profit on sports bets is derived from "vigorish", or the extra 10% that a bettor pays on a bet. To win $100, a bettor must put up $110. Ideally, a bookmaker "balances" his books, having an equal amount of bets on both teams. Therefore, regardless of which team wins, he will turn a profit, collecting more in losses than he pays out in winnings.

On October 4, 1966, the United States Commissioner at Los Angeles, California, issued an arrest warrant for appellant

Domenic Mastrippolito. Pursuant to this warrant, the appellant Mastrippolito was arrested while leaving his automobile on October 10, 1966. A search of his person revealed a sports journal used to record changes in "line" information or odds (Exhibit No. 14). In his automobile, cash in the amount of $9,643.00 was found under the front seat. After being advised of his rights, Mr. Mastrippolito, referring to the arresting agent, asked another agent, "Am I the only bookmaker he knows?".

Numerous bettors were located through the records seized and phone calls received at the apartment occupied by appellant Howard. At trial, Morton Kendall testified that appellant Mastrippolito assigned him a code number and told him he could place bets over telephone No. PO 9-4494, the number listed to Apartment 11, 3871 Willowcrest Avenue, North Hollywood, California. He was also given telephone No. TR -20101, the number listed to appellant Howard at the apartment where he was arrested. Kendall testified he placed several sports wagers over each of these numbers during the week ending October 1, 1966. These wagers were at bookmaker's odds, and Kendall testified he left the money to pay his losses with his secretary, instructing her to give the money to appellant Mastrippolito.

Kermit Baumoel testified that appellant Mastrippolito gave him telephone numbers TR 7-7880 and 981-1234 for the purpose of placing wagers. By stipulation it was admitted that TR 7-7780, with PO 9-4494, was listed to Penelope Spencer at the Willowcrest address, while 981-1234, with TR 2-0101, was listed to appellant

Howard at the apartment where he was arrested (Exhibit No. 19). Baumoel admitted placing several sports wagers over these numbers during the period July - October, 1966, and that he settled his wins and losses directly with appellant Mastrippolito.

By Stipulation (Exhibit No. 21), Dean Martin testified that during the period July - October, 1966, he placed several sports wagers at bookmaker's odds, both in person to appellant Mastrippolito and by calling TR 7-7780. Payment of losses was made directly to Mr. Mastrippolito.

Also by stipulation, Dr. Kay Toma testified that on numerous occasions he called TR 2-0101 for the purpose of placing wagers with appellant Howard, the most recent occasion being September, 1966.

After offering in evidence certified copies of four prior convictions of appellant Mastrippolito for the same offense, which offer was rejected as "unnecessary", the Government rested. Neither appellant presented a defense.

The trial court found both defendants guilty of both counts of the indictment.

On January 30, 1967, appellant Howard's motion for a new trial, joined by appellant Mastrippolito, was denied. Both appellants were sentenced to one year imprisonment on each count, the sentences to run concurrently.

On February 9, 1967, Judge Curtis entered an Order modifying sentence, providing that in lieu of the sentence imposed January 30, 1966, appellant Howard pay a fine of $300.

On March 1, 1967, the judgment as to appellant Howard was satisfied by payment of the fine in full.

This appeal then followed.

IV

ARGUMENT

A. THIS COURT DOES NOT HAVE JURISDICTION TO ENTERTAIN AN APPEAL FROM A CRIMINAL CONVICTION WHERE THE ONLY SENTENCE IMPOSED, A FINE, HAS BEEN PAID IN FULL WITHOUT SECURING A STAY OF EXECUTION.

As stipulated, appellant Howard was originally sentenced on January 30, 1967, to one year on each count, the sentences to run concurrently. His notice of appeal was filed on February 6, 1967. On February 9, 1967, Judge Curtis entered an order modifying sentence, providing that in lieu of the sentence imposed January 30, 1966, the appellant pay a fine of $300. On March 1, 1967, the fine was paid in full. It is the appellee's contention that payment of the fine rendered this appeal moot as to appellant Howard.

Rule 38(a)(3) of the Federal Rules of Criminal Procedure provides that a sentence to pay a fine may be stayed by the District Court or by the Court of Appeals upon such terms as the court deems proper. Here, however, no effort was made to stay execution of the sentence.

This Court has twice before been presented with an identical situation. In Gillen v. United States, 199 F.2d 454

(9th Cir. 1952), this Court dismissed as moot an appeal from a criminal conviction in which the fine imposed had been paid, citing Hanback v. District of Columbia, 35 A.2d 189 (D.C. Mun. App.). More recently, in Penneywell v. McCarrey, 255 F.2d 735 (9th Cir. 1958), an appeal was dismissed as moot because a fine had been paid, even though the ordinance under which the appellant had been convicted was subsequently declared invalid, and the fact that the fine had been paid was unknown to appellant's attorney. Accord: Government of Virgin Islands v. Ferrer, 275 F.2d 497 (3rd Cir. 1960); Bergdoll v. United States, 279 Fed. 404 (3rd Cir. 1922), cert. denied 259 U.S. 585.

The situation presented here is analogous to that of a prisoner who has served his sentence of imprisonment in full prior to the determination of his appeal. The appeal is rendered moot. St. Pierre v. United States, 319 U.S. 41 (1943); Williams v. United States, 261 F.2d 224 (9th Cir. 1958), cert. denied 358 U.S. 942.

As stated by the Supreme Court in St. Pierre v. United States, supra, at p. 43: "The moral stigma of a judgment which no longer affects legal rights does not present a case or controversy for appellate review." Cf. City of Seldovia v. Lund, 138 F. Supp. 382 (D. Alaska 1956).

B. MARCHETTI v. UNITED STATES DOES NOT REQUIRE REVERSAL OF THE CONVICTION OF APPELLANT MASTRIPPOLITO.

On January 29, 1968, the United States Supreme Court handed down its long awaited opinion in the case of Marchetti v. United States, ___ U.S. ___, 36 L.W. 4143. Marchetti was an appeal from convictions of both failure to pay the occupational tax imposed by Section 4411, Title 26, United States Code, and the accompanying registration provision, Title 26, United States Code, Section 4412. [1/] The Supreme Court had granted certiorari to re-examine the constitutionality under the Fifth Amendment of the wagering tax statutes. 385 U.S. 1000. In reversing Marchetti's conviction, the Supreme Court held:

> "that petitioner properly asserted the privilege against self-incrimination, and that his assertion should have provided a complete defense to this prosecution. . . . We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements."

1/ The appellants here were convicted only of evading, and aiding and abetting the evasion of, the occupational tax. They were not convicted of failure to register under Section 4412 as asserted in Appellants' Opening Brief, pp. 1, 2.

Slip Opinion at p. 21; 36 L. W. at 4149-50. (Emphasis added).

It is submitted that the conviction of appellant Mastrippolito differs in two significant respects from the Marchetti case, each of which requires a result different than that in Marchetti. First, neither appellant at any time asserted his constitutional privilege in the proceedings below. Secondly, and most important, both appellants stand convicted of the crime of aiding and abetting each other.

In the Marchetti opinion, the Supreme Court went to great pains to emphasize that self-incrimination was a defense to a criminal prosecution. For example:

> "We have concluded that these provisions may not be employed to punish criminally those persons who have defended a failure to comply with their requirements with a proper assertion of the privilege against self-incrimination." Slip Opinion at p. 2, 36 L. W. at 4144. (Emphasis added).

> "It would appear that petitioner's assertion of the privilege as a defense to this prosecution was entirely proper, and accordingly should have sufficed to prevent his conviction." Slip Opinion at p. 10, 36 L. W. at 4146. (Emphasis added).

"We conclude that nothing in the Court's opinions in Kahriger and Lewis now suffices to preclude petitioner's assertion of the constitutional privilege as a defense to the indictments under which he was convicted." Slip Opinion at p. 15, 36 L. W. at 4148. (Emphasis added).

"We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements." Slip Opinion at p. 21, 36 L. W. at 4149-50.

Here, unlike Marchetti, the appellants at no time during the course of proceedings in the Court below asserted their privilege against self-incrimination as a defense. The question was first raised on appeal to this Court. It has repeatedly been held that a defense may not be raised for the first time on appeal. Cellino v. United States, 276 F. 2d 941, 947 (9th Cir. 1960); Ramirez v. United States, 294 F. 2d 277 (9th Cir. 1961); Hedgepeth v. United States, 365 F. 2d 952 (D. C. Cir. 1966); United States v. Bishop, 367 F. 2d 806 (2nd Cir. 1966).

The second and most significant respect in which the conviction of appellants differs from Marchetti is that both stand

convicted of aiding and abetting each other in violation of Section 2, Title 18, United States Code.

Aiding and abetting is a separate offense, of which one can be convicted even though he is incapable of himself committing the substantive crime of which he is accused of aiding and abetting. United States v. Melekh, 193 F. Supp. 586, 592 (N.D. Ill. 1961); Haggerty v. United States, 5 F.2d 224 (7th Cir. 1925).

Clearly, one who is accused of aiding and abetting another to evade the wagering tax could not defend by asserting the Fifth Amendment privilege of the person he was assisting. The privilege against self-incrimination "is purely a personal privilege". Hale v. Henkel, 201 U.S. 43, 69 (1906); Rogers v. United States, 340 U.S. 367, 371 (1951). Thus, a defendant cannot assert the privilege on behalf of a witness called to testify against him. Bowman v. United States, 350 F.2d 913 (9th Cir. 1965), cert. denied 383 U.S. 950; Long v. United States, 360 F.2d 829, 834 (D.C. Cir. 1966). Similarly, one defendant cannot assert the privilege on behalf of a co-defendant. This was implicitly recognized by the Supreme Court in Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1961). In upholding the Board classification of the Party as a "communist action" organization required to register, the claim that the registration requirement would compel party officers to incriminate themselves was rejected as premature, since only the officers themselves could invoke their privilege:

> "The privilege against self-incrimination is one which normally must be claimed by the individual who seeks

to avail himself of its protection." 367 U.S. at 107. When the privilege was properly asserted, it was subsequently upheld. Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965).

As noted above, neither appellant asserted his Fifth Amendment privilege on his own behalf at trial. Even if appellant Mastrippolito were allowed to assert his privilege for the first time on appeal, it would serve only to bar his conviction for himself having evaded the tax. Since a defendant has "no right to insist that other guilty persons stand on their rights", Poole v. United States, 329 F.2d 720, 721 (9th Cir. 1964), his conviction for aiding and abetting remains intact, falling within the class of cases the Supreme Court had in mind when it concluded Marchetti by stating:

> "If, in different circumstances, a taxpayer is not confronted by substantial hazards of self-incrimination, or if he is otherwise outside the privilege's protection, nothing we decide today would shield him from the various penalties prescribed by the wagering tax statutes." Slip Opinion at p. 21, 36 L.W. at 4150.

CONCLUSION

The appeal of appellant Howard being moot, the appellee respectfully prays that it be dismissed. The Government further submits that the holding of the Supreme Court in Marchetti v. United States does not require reversal of the conviction of appellant Mastrippolito.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

DAVID R. NISSEN,
Assistant U. S. Attorney,
Chief, Special Prosecutions
Division,

GERALD F. UELMEN,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Gerald F. Uelmen
GERALD F. UELMEN